In the High Court of Judicature for Rajasthan
Jaipur Bench

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Cr. Misc. Petition No.140/2000
Sameer Saraogi & 6 Ors. ***Versus*** Union of India .

Date of Order ::: 18/09/07

Hon'ble Mr. Justice Ajay Rastogi

Mr. SR Bajwa Sr.Adv.)
Mr. VR Bajwa) for petitioners
Mr. Kamlakar Sharma, Standing Counsel for Union of India

Instant petition U/s 482 CrPC is directed against order dt.01/03/2000, whereby Special Judicial Magistrate (Economic Offences) Rajasthan, Jaipur took cognizance of offences punishable U/Ss 18(2), 18(3) & 64(2) of Foreign Exchange Regulation Act (“**FERA**”) and issued process against petitioners - all of whom other than Sanjiv Saraogi were summoned through arrest warrant.

Petitioner Nos.1 to 4 (Sameer, Ram Avatar, Bajrang Lal & Mrs.Kavita Saraogi) are Directors of M/s Vinayak Images (P) Ltd., while petitioner No.5 (Sanjiv Saraogi) is Managing Director of M/s Vinayak Images (P) Ltd and so also Proprietor of M/s Vinayak Creations. Indisputably, both the Cos. (petitioner Nos.6 & 7), of which all petitioners are Directors/

Managing Director/Proprietor, are engaged in business of exporting ready-made garments after regular registration for export with due permission of Reserve Bank of India. In the year 1995, about 5-7 export consignments are said to have been made by petitioner-Company to one Ashok Ramchandani – relevant documents whereof were routed through Bank of Baroda, Nehru Place, Jaipur for collection of payments. Since outstanding export proceeds of both the Cos., for exported goods were not being realised despite extension of time during which they made efforts for realisation of export proceeds, therefore, Enforcement Directorate of FERA investigated into matter and after holding inquiry under FERA, issued notice to petitioners U/s 40 of FERA and after they were summoned, statements were recorded, whereby it revealed that they failed to take reasonable & sincere efforts for realisation of export proceeds, and so also after recording statement of Ashok Ramchandani who indulged in abetting offence U/s 64(2) of FERA, complaint U/s 56 of FERA was filed for offences U/s 18(2) & 18 (3) read with S.64(2) punishable U/s 56 of FERA against petitioners and Ashok Ramchandani, before Court of Special Judicial Magistrate (economic

Offence) Rajasthan Jaipur wherein Case NO.35/2000 was registered. After considering complaint, learned Magistrate took cognizance of offences, (supra) and issued process against petitioners and in order to procure their appearance issued arrest warrant against petitioners except Sanjiv Sarogi who was already in judicial custody.

Counsel for petitioners submits that from a bare reading of complaint, itself, it does not disclose as to what offence has been committed by petitioners – in absence whereof, very cognizance taken by learned Magistrate in facts & circumstances of instant case is not legally sustainable, inasmuch as neither complaint nor order taking cognizance discloses incriminating material to prima facie make out case for commission of offences under FERA against petitioners; that apart, complaint itself, is a mere reproduction of provisions of FERA, and does not disclose as to what kind of offence has been committed and how Co.'s Directors are directly connected with affairs of Co., in what manner at the time of contravention of various provisions of FERA, to which learned Magistrate failed to apply its judicial mind and thus committed an error of law while taking

cognizance without disclosing reasons under order impugned.

Counsel further submits that summoning of petitioners for procuring their appearance through arrest warrant is a serious matter while criminal law cannot be set into motion as a matter of course unless complaint discloses prima facie material to make out a case of vicarious liability qua petitioners for commission of offence under FERA; and more so when S.68 of FERA casts obligation upon complainant (prosecution) to disclose in complaint as to whether contravention of any provision of FERA on the part of Co., can make vicariously liable only such persons who at the time of contravention were in-charge or responsible for act of the Co., for its conduct of business – in absence whereof, learned Magistrate committed serious manifest error in taking cognizance against petitioners and permitting their prosecution further in facts of instant case will be nothing but an abuse of process of law.

Counsel relied upon decisions in **Punjab National Bank Vs. Surendra Pd. Sinha (AIR 1992 SC 1815); Pepsi Foods Ltd Vs. Special Judl. Magistrate (AIR 1998 SC 128) and Ashok Chaturvedi**

Vs. Shitul H. Chanchani (AIR 1998 SC 2796) – on the strength whereof, Counsel submits that unless basic ingredients of offence are disclosed in complaint, itself, which are lacking in the order impugned, taking cognizance, accused in such criminal proceedings cannot be summoned by arrest warrant and such proceedings in no manner can be said to be sustainable in the eye of law.

Counsel further submits that as it appears from order impugned, cognizance has been taken only in regard to contravention alleged of Sections 18(2), 18(3), for which one can be punished only U/s 56 of FERA – cognizance whereof has not been taken by learned Magistrate – in absence whereof very cognizance taken only of mere contravention of FERA provisions is not legally sustainable and it clearly shows that learned Magistrate has not applied its mind while passing order impugned for taking cognizance of offence against petitioners. In support, Counsel placed reliance upon decision of Orissa High Court in **Gayadhar Ojha Vs. State of Orissa (1991 CRLJ 2642**).

Counsel for respondent-Enforcement Directorate (complainant) supported the order of

taking cognizance impugned, and submits that procedure for holding inquiry and investigation has been provided under FERA and before complaint was finally lodged, a thorough investigation was undertaken – in course whereof, notices U/s 40 of FERA were issued to Sanjiv Saraogi and so also other petitioners in their individual capacity besides as Directors/Proprietor of Co., and statements were recorded and documentary evidence were taken on record but Sanjiv Saraogi submitted stale reply but other petitioners failed to respond notices issued against them U/s 40; therefore, after examining explanations wrung out of their statements & documents appended thereto, prima facie it appears that they had failed to make reasonable & sincere efforts for realisation of export proceeds in course of extension of time whereof granted by Reserve Bank of India and only thereafter complaint was filed U/s 56 for contravention of Sections 18(2) & 18(3) and for taking cognizance of offence against them U/s 56 of FERA.

Counsel further submits that complaint disclose not only contravention of FERA provisions but also discloses about petitioners being direct responsible to the Company being In

charge for conduct of Co.'s business as regards contravention of FERA provisions at the time of commission of such violation; and this being a warrant case, petitioners even have a liberty to file application U/s 245, CrPC in course of trial, therefore, no error was committed by learned Magistrate in taking cognizance impugned. In support, Counsel relied upon decisions of Apex Court in -

(1)SMS Pharmaceuticals Ltd Vs. Neeta Bhalla (AIR 2005 SC 3512);

(2) Up Pollution Control Board Vs. Mohan Meakins (2000(3) SCC 745);

(3) Tarun K.Shah Vs. CR Alimchandani (2001(9) SCC 728) &

(4) CREF Finance Ltd Vs. S.Shanti Homes (P) Ltd. (2005(7) SCC 467).

I have considered rival contentions of Counsel for both the parties and with their assistance examined material on record. There cannot be any dispute that primarily it is a responsibility of complainant to make averments in the complaint establishing the fact so as to make an accused vicarious liable for fastening the criminal liability and no presumption can be drawn that every partner/Director of Co., knows about transaction made at the time of

contravention alleged against accused and they were in-charge and directly responsible for conduct of business of the Company/concern. Liability U/s 68 of FERA is therefore to be fastened vicariously on the person connected with principal accused being Co., itself. In criminal law, every role of vicarious liability should be spelled out in complaint, itself against persons sought to be made liable.

In **SMS Pharmaceuticals Ltd Vs. Neeta Bhalla, ibid** while examining analogous provisions of S.141 of Negotiable Instruments Act, Apex Court observed ad infra:-

> **"20.** In view of the above discussion, our answers to the questions posed in the Reference are as under:
> (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141.

> So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

Judgments relied by Counsel for petitioner have been taken note of by Apex Court in **SMS Pharmaceuticals Ltd Vs. Neeta Bhalla** (supra); as such those decisions are not discussed in details.

As regards requirement of prima facie material required to be disclosed to fasten vicarious liability upon principal accused being Co., in **Up Pollution Control Board Vs. Mohan Meakins Ltd** (supra), while examining Section 47 of UP Pollution Control Act, which relates to commission of an offence by Co. and wherein offence U/s 47 if committed by Co., person who was in-charge of and responsible for conduct of business of the Co. is also made guilty of offence by statutory provisions; the Apex Court reproduced para 12 of complaint therein which had been looked into by learned Magistrate while issuing process; and after making reference whereof, observed that it is sufficient disclosure of person being held responsible for

the act and they are liable to be prosecuted in accordance with law. Extract of para 12 referred to in **Up Pollution Control Board Vs. Mohan Meakins Ltd** (supra) runs ad infra :-

> **"12**. In the above context what is to be looked at during the stage of issuing process is whether there are allegations in the complaint by which the Managers or Directors of the company can also be proceeded against, when the company is alleged to be guilty of the offence. Paragraph 12 of the complaint reads thus:
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> "That the accused persons from 2 to 11 are directors/managers /partners of M/s Mohan Meakins Distillery, Daliganj, Lucknow, as mentioned in this complaint are responsible for constructing the proper works and plant for the treatment of their highly polluting trade effluent so as to conform the standard laid down by the Board.
>
> Aforesaid accused persons are deliberately avoiding to abide the provisions of sections 24 and 26 of the aforesaid Act which are punishable respectively under Sections 43 and 44 of the aforesaid Act, for which not only the company but its directors managers,

> secretary and all other responsible officers of the accused company, responsible for the conduct of its business are also liable in accordance with the provision of the Section 47 of the Act."
>
> The appellant has further stated in paragraph 23 of the complaint that "the Chairman Managing Directors and Directors of the company are the persons responsible for the act and therefore, they are liable to be proceeded against according to the law."

In instant case, complaint filed by respondent discloses violation of commission of offence under FERA as is evident from paras 2, 3 & 12 of complaint, ad infra:

> **"(2)** That the accused M/s Vinayak Images (P) Ltd., have violated the provisions of Sections 18(2) and 18(3) of Foreign Exchange Regulation Act, 1973 and its Directors S/Shri Sanjeev Saraogi, Samir Saraogi, Ram Avtar Saraogi, Bajrang Lal Saraogi and Smt. Avita Saraogi were in charge of, and were responsible to, the company for the conduct of business of the company as well the company at the time of contravention was committed, and the said company have also violated the

provisions of Sections 18(2) and 18 (3) of Foreign Exchange Regulation Act, 1973 in terms of Section 68(1) ibid."

"3. That M/s Vinayaka Creations and its proprietor Shri Sanjeev Saraogi have violated the provisions of Sections 18(2) and 18(3) of Foreign Exchange Regulation Act, 1973."

"12. Shri Sanjeev Saraogi received the opportunity notice for M/s Vinayak Images (P) Ltd., M/s Vinayaka Creations and himself. The opportunity notices were served upon him in Central Jail, Jaipur on 10/02/2000, Opportunity notices were served on Shri Samir Saraogi, Director of M/s Vinayaka Images(P) Ltd on 10/02/2000. Shri Samir Saraogi received the Opportunity Notices for M/s Vinayaka Images (P)Ltd S/Shri Ram Avtar Saraogi, Bajrang Lal Saraogi, Smt. Kavita Saraogi and himself, Directors of Vinayaka Images (P) Ltd and the Opportunity Notice was served by way of affixture under Rule 3(e) Foreign Exchange Regulation Rules, 1974 on Shri Ashok Ramchandani on 10/02/2000. No reply have been received from any of the accused so far. "

Thus, it has come on record in course of inquiry & investigation in detail after petitioners being

summoned through notices and their statements recorded U/s 40 of FERA that Sanjiv Saraogi was one of Directors of M/s Vinayak Images (P) Ltd and so also as Proprietor of M/s Vinayaka Creations at the time of alleged contravention of FERA provisions and it prima facie discloses that petitioners being Directors/ Proprietor were in-charge and directly responsible to the Company for conduct of its business at the time of contravention of U/Ss 18(2) & 18(3) of FERA.

Cognizance is taken at initial stage when Magistrate peruses complaint with a view to ascertain as to whether commission of offence is disclosed therein and made out. When cognizance is taken of offence and not of offenders and, therefore, once on a perusal of complaint, Court is satisfied that it discloses prima facie material for commission of offence on the part of petitioners, there is no reason available to reject complaint at initial stage, except to take cognizance of offence. In instant case, on a perusal of complaint, this Court is satisfied that there was prima facie disclosure of material therein averred by respondent (complainant) about contravention of FERA provisions and commission of offence on the part of petitioners which is

punishable U/s 56 of FERA. In the opinion of this Court, no error has been committed by learned Magistrate in taking cognizance and issuing process impugned.

Submission made by Counsel for petitioners about complaint not disclosing commission of offence under FERA, and order taking cognizance being non-speaking and passed without application of judicial mind, is of no substance. As regards complaint as observed (supra), it discloses nature of commission of offence and so also about incriminating act of petitioners, as well within purview of S.68 of the Act of their being in-charge and directly responsible for conduct of business of Company at the time of contravention of FERA provisions, in question. After perusal of complaint, learned Magistrate took cognizance of offence. In opinion of this Court, reasons are required to be disclosed if accused is to be discharged but not while taking cognizance; and there is no such requirement under law. This has been considered by Apex Court in **CREF Finance Ltd Vs. Shree Shanti Homes (P) Ltd. (**supra) while it reproduced order taking cognizance in para 3 on being satisfied with complaint disclosing nature of

commission of offence; and observed that reasons while taking cognizance are not required under law. In this regard, judgments cited by Counsel for petitioner cited in **Pepsi Foods Ltd Vs. Special Judl. Magistrate** (supra) **& Gayadhar Ojha Vs. State of Orissa** (supra) are of no assistance for the reason that in both the cases, ibid, finding has been recorded that complaint does not disclose the fact about involvement of accused for commission of offence and after recording such finding of non-disclosure of material facts in complaint, itself, about commission of offence, it was interfered by the Court. While in instant case, material facts borne out of complaint, itself have been reproduced above which certainly disclose incriminating act of petitioners and their being in-charge and directly responsible for conduct of business of Company for contravention of FERA provisions, and which prima facie disclosed offence under FERA.

Submission made by Counsel for petitioners that cognizance has been taken of contravention of Sections 18(2) & 18(3) of FERA and not of offence U/s 56 in which alone, punishment could be imposed, is of no substance. Once complaint discloses prima facie material to

constitute offence of contravention of FERA provisions, for which obviously petitioners will appear on process while taking cognizance and will have opportunity to lead their defence during trial in contrast to contravention alleged in complaint; and Section 56 of FERA is consequential implied action if contravention of FERA provisions are proved, certainly one can be punished U/s 56 of FERA. Thus, this Court finds no error which can be said to have been committed by Magistrate while taking cognizance regarding contravention of FERA provisions under the order impugned.

Similarly, judgment cited by Counsel for petitioners in **Gayadhar Ojha Vs. State of Orissa** (supra) is also no assistance for the reason that it was a case where accused was finally convicted U/s 46 Orissa Forest Act and on examining scheme of the Act, Orissa High Court observed that S.46 in which cognizance was taken is not a penal section and thus substance of accusation stated to the accused does not carry any meaning as he could not have been convicted U/s 46; while in instant case, offence disclosed in complaint relates to contravention of FERA provisions {S.18 (2) & 18(3)}, which is punishable U/s 56 of FERA,

under which complaint, itself has been submitted and cognizance of averments alleging offences have been taken whereof.

This Court refrains from expressing any opinion on merits of allegations made in complaint as it may cause prejudice either of party and what has been observed above are merely on the basis of disclosure of material in complaint alone that petitioners were in-charge & directly responsible for conduct of business of company for contravention of FERA provisions (Ss.18(2) & 18(3)) at relevant point of time as disclosed in complaint, itself, and it might be possible that such allegations in course of trial be found incorrect in whole or in part. That being so, petitioners are free to raise such plea in their defence in accordance with law in course of trial if so advised.

Consequently, misc. petition fails and is hereby dismissed. Record be sent back forthwith directing the learned Magistrate to expedite trial, itself, keeping in view incident being of the year 1995.

(**Ajay Rastogi), J.**